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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CONFIDENTIAL

STATE OF WASHINGTON; and
PACCAR, INC.

Plaintiffs,

v.

UNITED STATES OF AMERICA,
et al.,

Defendant.

No. C94-5326 FDB
No. C94-5518 FDB

CONSENT JUDGMENT
BETWEEN THE UNITED
STATES AND THE STATE

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF WASHINGTON, and
PACCAR, INC.,

Defendants.

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The Honorable Franklin D. Burgess

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AT TACOMA

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I. BACKGROUND

A. On June 17, 1994, the State of Washington (State) and PACCAR Inc (PACCAR) filed civil complaint No. C94-5326 against the United States of America (United States) alleging liability under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9607 and 9613, and seeking declaratory relief and recovery of

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1 response costs incurred and to be incurred at the Wyckoff/Eagle
2 Harbor Superfund Site at Bainbridge Island, Washington (Site).

3 B. On September 19, 1994, the United States, on behalf of
4 the Administrator of the United States Environmental Protection
5 Agency (EPA), filed civil complaint No.C94-5518 against the State
6 and PACCAR alleging liability under Section 107 of CERCLA, 42
7 U.S.C. § 9607, and seeking declaratory relief and recovery of
8 response costs incurred and to be incurred at the Site.

9 C. The United States, in its complaint, seeks inter alia:
10 (1) reimbursement of costs incurred by EPA and the Department of
11 Justice for response actions at the West Harbor Operable Unit
12 (WHOU) and East Harbor Operable Unit (EHOU) of the Site, together
13 with accrued interest; and (2) performance of response work by
14 the defendants at the Site consistent with the National
15 Contingency Plan, 40 C.F.R. Part 300, as amended (NCP).

16 D. On January 11, 1995, the United States stipulated that
17 it was not seeking from the State costs incurred by EPA in
18 conducting response actions at the Wyckoff Facility Operable Unit
19 or the Wyckoff Groundwater Operable Unit of the Site.

20 E. On February 1, 1995, this Court consolidated civil
21 action No. C94-5518 with civil action No. C94-5326.

22 F. The State does not admit any liability to the United
23 States arising out of the transactions or occurrences alleged in
24 the United States' complaint, nor does the State acknowledge that
25 the release or threatened release of hazardous substances at or

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1 from the Site constitutes an imminent or substantial endangerment
2 to the public health or welfare or the environment.

3 G. The decision by EPA on the remedial action to be
4 implemented at the WHOU is embodied in the Record of Decision and
5 Amended Record of Decision for the WHOU, executed on September
6 29, 1992, and December 8, 1995, respectively (together referred
7 to as the WHOU ROD), and at the EHOU is embodied in the Record of
8 Decision for the EHOU, executed on September 29, 1994 (EHOU ROD).

9 H. PACCAR, with participation by the State, prepared the
10 remedial design for the remedial action to be implemented at the
11 WHOU (WHOU Remedial Design). The WHOU Remedial Design, which was
12 undertaken in accordance with an administrative order on consent
13 issued by EPA, was initially approved by EPA on May 29, 1996,
14 with a revision thereto approved by EPA on March 11, 1997. The
15 Operation, Maintenance and Monitoring Plan (OMMP), which was
16 submitted as a part of the WHOU Remedial Design, has been revised
17 by the State, and this revision was approved by EPA on November
18 19, 1997.

19 I. The United States and the State recognize, and the Court
20 by entering this Consent Judgment finds, that this Consent
21 Judgment has been negotiated in good faith, that settlement of
22 this matter will avoid prolonged and complicated litigation, and
23 that this Consent Judgment is fair, reasonable, and in the public
24 interest. Further, the United States and the State agree, and
25 this Court finds, that this Consent Judgment is enforceable to

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1 the same extent as a consent decree under Section 122 of CERCLA,
2 42 U.S.C. § 9622.

3 THEREFORE, with the consent of the United States and the
4 State, it is ORDERED, ADJUDGED, AND DECREED:

5 II. JURISDICTION

6 1. This Court has jurisdiction over the subject matter of
7 this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C.
8 §§ 9607 and 9613(b), and also has personal jurisdiction over the
9 State. The State consents to and shall not challenge entry of
10 this Consent Judgment or this Court's jurisdiction to enter and
11 enforce this Consent Judgment.

12 III. PARTIES BOUND

13 2. This Consent Judgment is binding upon the United States
14 and the State. Any change in ownership or other legal status,
15 including, but not limited to, any transfer of assets or real or
16 personal property, shall in no way alter the status or
17 responsibilities of the State under this Consent Judgment.

18 IV. DEFINITIONS

19 3. Unless otherwise expressly provided herein, terms used
20 in this Consent Judgment which are defined in CERCLA or in
21 regulations promulgated under CERCLA shall have the meaning
22 assigned to them in CERCLA or in such regulations. Whenever the
23 terms listed in this Section IV (DEFINITIONS) are used in this
24 Consent Judgment or in any appendix attached hereto, the
25 definitions set forth below shall apply.

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1 "Additional Response Actions" shall mean any additional work
2 necessary to achieve the Goals and Objectives set forth in the
3 WHOU ROD. Additional Response Actions must be consistent with
4 and within the scope of the Remedial Action selected in the WHOU
5 ROD. Additional Response Actions do not include the WHOU
6 Remedial Work, Habitat Mitigation Work or O&M.

7 "CERCLA" shall mean the Comprehensive Environmental
8 Response, Compensation, and Liability Act of 1980, as amended,
9 42 U.S.C. § 9601, et seq.

10 "Consent Judgment" shall mean this Consent Judgment and all
11 appendices attached hereto. In the event of conflict between
12 this Consent Judgment and any appendix, the Consent Judgment
13 shall control.

14 "Day" shall mean a calendar day. In computing any period of
15 time under this Consent Judgment, where the last day would fall
16 on a Saturday, Sunday, or State or Federal holiday, the period
17 shall run until the close of business of the next working day.

18 "DOJ" shall mean the United States Department of Justice and
19 any successor departments, agencies, or instrumentalities of the
20 United States.

21 "East Harbor Operable Unit" or "EHOU" shall mean the
22 contaminated intertidal and subtidal sediments in the eastern
23 portions of Eagle Harbor, as defined in Section 5, page 15, of
24 the EHOU ROD, and as set forth in Figure 3 on page 9 of the EHOU
25 ROD.

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1 "EHOU ROD" shall mean the East Harbor Operable Unit Record
2 of Decision, signed on September 29, 1994, and any amendments
3 thereto.

4 "EPA" shall mean the United States Environmental Protection
5 Agency and any successor departments or agencies of the United
6 States.

7 "EPA Hazardous Substance Superfund" shall mean the Hazardous
8 Substance Superfund established by the Internal Revenue Code, 26
9 U.S.C. § 9507.

10 "Goals and Objectives" shall mean those cleanup commitments,
11 other than the Performance Standards specified in the Consent
12 Decree entered into between PACCAR and the United States, which
13 are set forth in Section 10 of the Record of Decision for the
14 WHOU signed by EPA on September 29, 1992, and in the Decision
15 Summary of the Amended Record of Decision for the WHOU signed by
16 EPA on December 8, 1995.

17 "Habitat Mitigation Work" shall mean the habitat mitigation
18 and enhancement actions necessary for the Remedial Action to
19 comply with Section 404 (b) (1) of the Clean Water Act, 33 U.S.C.
20 § 1344(b) (1). These actions are identified in the WHOU ROD and
21 are more fully defined in Section 2.5 of the WHOU Remedial
22 Design.

23 "Interest" shall mean interest at the current rate specified
24 for interest on investments of the Hazardous Substance Superfund
25 established by 26 U.S.C. § 9507, compounded annually on October 1

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1 of each year, in accordance with 42 U.S.C. § 9607(a).

2 "Operation and Maintenance" or "O&M" shall mean those
3 activities required to maintain the effectiveness of the WHOU
4 Remedial Work, Habitat Mitigation Work, and Additional Response
5 Actions, as set forth in the OMMP.

6 "Operation, Maintenance and Monitoring Plan" or "OMMP" shall
7 mean the plan for O&M that was approved by EPA on November 19,
8 1997, a copy of which is provided as Appendix A to this Consent
9 Judgment, and any additional revisions developed in accordance
10 with Section XXVIII (MODIFICATIONS) of this Consent Judgment.

11 "Paragraph" shall mean a portion of this Consent Judgment
12 identified by an Arabic numeral or an upper or lower case letter.

13 "Remedial Action" shall mean the remedial action for the
14 WHOU set forth in the WHOU ROD, and includes the WHOU Remedial
15 Work, Habitat Mitigation Work, O&M, and Additional Response
16 Actions.

17 "Response Costs" shall mean all costs incurred by the United
18 States in response to releases of hazardous substances at the
19 Site.

20 "Section" shall mean a portion of this Consent Judgment
21 identified by a Roman numeral.

22 "Settling Federal Agencies" shall mean the United States
23 Navy, the United States Army, the United States Coast Guard &
24 Geodetic Survey, the United States Maritime Administration, and
25 all other potentially liable federal agencies and

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1 instrumentalities.

2 "Site" shall mean the Wyckoff/Eagle Harbor Superfund Site,
3 located at Bainbridge Island, Washington.

4 "State" shall mean the State of Washington, which is acting
5 through its agencies the Department of Natural Resources (DNR)
6 and Department of Transportation (WSDOT), and all agents and
7 assigns acting for or on behalf of those agencies.

8 "United States" shall mean the United States of America,
9 including its departments, agencies, and instrumentalities.

10 "West Harbor Operable Unit" or "WHOU" shall mean the
11 contaminated intertidal and subtidal sediments in the western
12 portions of Eagle Harbor, as well as upland sources of
13 contamination to those sediments, as set forth in the WHOU ROD.

14 "WHOU Remedial Design" shall mean the revised OMMP approved
15 by EPA on November 19, 1997, a copy of which is attached as
16 Appendix A to this Consent Judgment, and the Interim Technical
17 Memorandum, Upland Source Evaluation dated April 14, 1995, the
18 Design Submittal for the WHOU dated May 29, 1996, including any
19 amendments thereto, and the Design Addendum approved by EPA on
20 March 11, 1997, which are collectively attached as Appendix B to
21 the Consent Decree between PACCAR and the United States.

22 "WHOU Remedial Work" shall mean those activities set forth
23 in the WHOU Remedial Design, other than Habitat Mitigation Work,
24 O&M, and Additional Response Actions, undertaken by PACCAR in
25 compliance with the WHOU ROD and the Consent Decree between

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1 PACCAR and the United States.

2 "WHOU ROD" shall mean the Record of Decision signed by EPA
3 on September 29, 1992, the Amended Record of Decision signed by
4 EPA on December 8, 1995, and all attachments thereto, for the
5 West Harbor Operable Unit of the Site. The WHOU ROD is included
6 as Appendix A to the Consent Decree between PACCAR and the United
7 States.

8 V. PAYMENTS TO SITE-SPECIFIC SUPERFUND ACCOUNTS

9 4. Upon entry of this Consent Judgment, EPA shall have
10 established two Wyckoff/Eagle Harbor Superfund Site Special
11 Accounts within the EPA Hazardous Substance Superfund, referred
12 to herein as "the WHOU Account" and "the EHOU Account",
13 respectively. The funds paid by the State under this Consent
14 Judgment into the EHOU Account shall be used only to conduct or
15 finance response actions taken or performed at or in connection
16 with the EHOU. Upon completion of the remedial action for the
17 EHOU, EPA shall transfer any balance of funds remaining in the
18 EHOU Account to the EPA Hazardous Substance Superfund as
19 reimbursement for costs incurred by EPA for response actions in
20 the EHOU, including the capping of contaminated sediments. All
21 funds paid under this Consent Judgment into the WHOU Account
22 shall be used to reimburse EPA for future Response Costs incurred
23 in overseeing implementation of the Remedial Action for the WHOU.

24 5. Within thirty (30) days of entry of this Consent
25 Judgment, DNR shall pay TWO MILLION THREE HUNDRED THOUSAND

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1 DOLLARS (\$2,300,000.00) by State warrant made payable to "EPA
2 Hazardous Substances Superfund" referencing EPA Region 10 and
3 Site/Spill ID # 10S1 and DOJ Case Number 90-7-1-525b. This
4 payment shall be mailed to the Mellon Bank, U.S. EPA, Region 10,
5 Attn: Superfund Accounting, P.O. Box 360903M, Pittsburgh,
6 Pennsylvania, 15251. The State shall send notice to the United
7 States that this payment has been made as specified in Section
8 XXV (NOTICES AND SUBMISSIONS) of this Consent Judgment. EPA
9 shall deposit \$2,200,000.00 from this payment to the EHOU Account
10 and \$100,000.00 from this payment to the WHOU Account.

11 6. The payment of \$2,300,000.00 to be made by DNR reflects
12 that the State has received a credit of \$200,000.00 for all
13 State-owned sediments to be made available for the remedial
14 action being implemented and to be implemented in accordance with
15 the WHOU ROD and EHOU ROD. In response to each request from EPA,
16 DNR shall make available sediments for use in performing remedial
17 action in accordance with the WHOU ROD and EHOU ROD. In each
18 instance, EPA shall provide reasonable notice to the State of the
19 amount of sediments required and a schedule for obtaining those
20 sediments. In cooperation with other state and federal agencies
21 with jurisdiction, DNR shall undertake best efforts to make the
22 sediments available in the amounts and on the schedule specified
23 by EPA. The State shall not seek any reimbursement from EPA for
24 sediments obtained in accordance with this Consent Judgment, and
25 the State waives any claim it may have for sediments used by EPA

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1 for past removal actions, and to be used for remedial action
2 being implemented and to be implemented in accordance with the
3 WHOU ROD.

4 VI. FAILURE TO COMPLY WITH PAYMENT REQUIREMENTS

5 7. In the event that the payment required by Paragraph 5
6 above is not made as specified therein, the State shall pay
7 Interest on the balance that remains unpaid. The Interest to be
8 paid under this Paragraph 7 shall begin to accrue thirty (30)
9 days after the date upon which the State's payment is due under
10 Paragraph 5 above. The Interest shall continue to accrue through
11 the date of payment by the State. The payment of Interest made
12 under this Paragraph 7 shall be in addition to such other
13 remedies or sanctions available to the United States by virtue of
14 failure of the State to make timely and full payment under
15 Paragraph 5 above. The State shall make all payments required by
16 this Paragraph 7 in the manner described in Paragraph 5 above.

17 VII. OTHER AQUATIC SITES

18 8. In an attempt to avoid costly litigation in the future,
19 resolve the State's liability for state-owned aquatic land at
20 other NPL sites, and make productive use of federal and State
21 resources, EPA and the State have initiated a process for seeking
22 to resolve State liability for other contaminated aquatic sites
23 where the State is alleged to be a liable party based upon its
24 status as owner or manager of aquatic lands.

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VIII. WORK TO BE PERFORMED

9. WSDOT, acting on behalf of the State, shall perform O&M and Habitat Mitigation Work, including undertaking and completing all of the actions specified in the WHOU Remedial Design - Design Analysis, Sections 2.1.8 - Source Control Performance Monitoring, 2.3.6 - Conducting Post-Remediation Monitoring and Maintenance, 2.4 - Tissue Monitoring, and 2.5 - Habitat Mitigation and Enhancement. Unless otherwise agreed to by EPA, WSDOT shall complete the construction and planting portions of the Habitat Mitigation Work by no later than October 31, 1998. The intertidal land transfer required as part of the Habitat Mitigation Work will be completed by WSDOT in accordance with the Memorandum of Agreement entered into on November 29, 1995, between WSDOT and the Suquamish Tribe.

10. WSDOT shall undertake and complete Operation and Maintenance (O&M) in accordance with the Operation, Maintenance and Monitoring Plan (OMMP), including all appendices and revisions thereto, and the schedule for monitoring and reporting provided in Figure 2 of the OMMP.

11. If EPA determines there is a need to perform Additional Response Actions, EPA shall so notify WSDOT in writing and include therein the basis for this determination. WSDOT shall undertake and complete all Additional Response Actions determined to be necessary by EPA in order to achieve the Goals and Objectives in the WHOU ROD. The determination by EPA of the need

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1 to perform Additional Response Actions shall be subject to the
2 dispute resolution procedures set forth in Paragraphs 62, 63, and
3 64 of Section XXII (DISPUTE RESOLUTION) of this Consent Judgment.

4 12. The State acknowledges that nothing in this Consent
5 Judgment, the WHOU Remedial Design, the OMMP, or any work plan
6 constitutes a representation of any kind by the United States
7 that compliance with the work requirements set forth therein will
8 achieve the Goals and Objectives of the WHOU ROD.

9 IX. SUBMITTAL OF PLANS, REPORTS, AND OTHER ITEMS

10 13. Unless otherwise agreed to by EPA, and with the
11 exception of the ongoing construction of the Shel-chelb Estuary,
12 at least sixty (60) days prior to commencing field activities for
13 O&M and Habitat Mitigation Work, WSDOT shall submit to EPA, for
14 review and approval, a work plan, sampling and analysis plan
15 (SAP) and quality assurance project plan (QAPP), or addenda to
16 the EPA-approved WHOU Remedial Design Work Plan, SAP, and QAPP
17 dated July 25, 1994.

18 14. In those instances where the OMMP requires the
19 submission of plans and schedules to EPA, WSDOT shall submit such
20 plans and schedules for review and approval to EPA. Each plan
21 and/or schedule shall be submitted by WSDOT either as part of the
22 next annual report required by the OMMP, or within thirty (30)
23 days of receipt of a request from EPA, whichever is earlier.

24 15. Within sixty (60) days of receipt of written notice
25 from EPA of the need to perform Additional Response Actions, or

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1 upon the initiative of WSDOT, WSDOT shall submit a plan and
2 schedule to EPA, for review and approval, for the performance of
3 Additional Response Actions.

4 16. Unless otherwise agreed to by EPA, at least thirty (30)
5 days prior to commencing field activities for O&M or Habitat
6 Mitigation Work not addressed by the Remedial Design Health and
7 Safety Plan dated July 25, 1994 (RD-HSP), or modifications to the
8 RD-HSP, WSDOT shall submit to EPA, for review, a Health and
9 Safety Plan, or an amendment or addendum to the RD-HSP.

10 17. WSDOT shall submit annual reports to EPA in accordance
11 with the OMMP. The first annual report shall be provided to EPA
12 no later than March 31, 1998, and subsequent reports shall be
13 provided by March 31 of each subsequent year. In addition, WSDOT
14 shall submit monitoring data reports to EPA in accordance with
15 the schedule and conditions in the OMMP.

16 18. WSDOT shall submit four (4) copies to EPA of all plans,
17 reports, and other items required for the Habitat Mitigation
18 Work, O&M, and Additional Response Actions. Upon request by EPA,
19 WSDOT shall provide EPA with one (1) copy of the full laboratory
20 documentation package.

21 X. EPA APPROVAL OF PLANS, REPORTS AND OTHER ITEMS

22 19. All plans, reports, and other items required to be
23 submitted or resubmitted under this Consent Judgment for review
24 and approval by EPA, or any portions of such plans, reports, and
25 other items which the State does not subject to dispute

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1 resolution in accordance with Section XXII (DISPUTE RESOLUTION)
2 of this Consent Judgment, shall, upon approval by EPA, be
3 implemented by the State and be enforceable requirements under
4 this Consent Judgment. WSDOT shall complete all Habitat
5 Mitigation Work, O&M, and Additional Response Actions in
6 accordance with the plans and schedules so approved by EPA.

7 20. In the event that EPA disapproves any plan, report, or
8 other item which is required to be submitted for review and
9 approval pursuant to this Consent Judgment, EPA shall afford
10 WSDOT an opportunity to correct the deficiencies. Within thirty
11 (30) days of receipt of EPA disapproval, WSDOT shall resubmit the
12 plan, report, or other item for review and approval by EPA. The
13 resubmitted plan, report, or other item shall address all
14 comments provided by EPA.

15 21. EPA disapproval of any plan, report, or other item that
16 has been resubmitted for review and approval pursuant to
17 Paragraph 20 above shall be subject to the dispute resolution
18 procedures set forth in Paragraphs 62, 63, and 64 of Section XXII
19 (DISPUTE RESOLUTION) of this Consent Judgment.

20 XI. PAYMENT FOR COST OVERRUNS AND ADDITIONAL RESPONSE ACTIONS

21 22. If the cost to PACCAR of performing the WHOU Remedial
22 Work exceeds \$3.6 million, WSDOT shall be responsible for paying
23 an amount equal to 15% of the costs which exceed \$3.6 million.
24 If the cost to WSDOT of performing the Habitat Mitigation Work
25 and O&M exceeds \$1.1 million, WSDOT may obtain reimbursement

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1 payments in amounts equal to 45% from PACCAR and 40% from the
2 United States, on behalf of the Settling Federal Agencies, of the
3 costs which exceed \$1.1 million.

4 23. In the event that WSDOT undertakes Additional Response
5 Actions at the WHOU, WSDOT may obtain reimbursements from PACCAR
6 and from the United States, on behalf of the Settling Federal
7 Agencies. For the purpose of receiving reimbursement for funding
8 Additional Response Actions undertaken in accordance with this
9 Consent Judgment, PACCAR shall fund 45% of the costs to implement
10 such Additional Response Actions, and the United States, on
11 behalf of the Settling Federal Agencies, shall fund 40% of the
12 costs to implement such Additional Response Actions.

13 24. It is anticipated that the monies needed for payment by
14 the United States as provided for in Paragraphs 22 and 23 above
15 shall be drawn from the Judgment Fund. Any requirement in this
16 Consent Judgment for the payment or obligation of such monies
17 shall be subject to the availability of appropriated funds, and
18 no provision herein shall be interpreted to require obligation or
19 payment of funds in violation of the Anti-Deficiency Act, 31
20 U.S.C. §§ 1341, 1342, and 1511-1519.

21 XII. PROJECT COORDINATORS

22 25. For purposes of the work to be performed by WSDOT, EPA
23 and WSDOT Project Coordinators are identified below:
24
25

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1 As to EPA:

2 Ellen Hale, Project Coordinator W/EH SITE-WHOU
3 U.S. Environmental Protection Agency
4 Office of Environmental Cleanup
1200 6th Avenue, ECL-115
Seattle, Washington 98101

5 As to WSDOT:

6 Paul Kressin
7 Eagle Harbor Facilities Manager
WSF
801 Alaskan Way
8 Seattle, Washington 98104-1487

9 26. WSDOT and EPA will provide each other five (5) days
10 advance notice of a change in project coordinator. WSDOT may
11 assign other representatives with appropriate technical
12 expertise, including contractors, to conduct or oversee the work.
13 EPA may designate other representatives, including but not
14 limited to EPA employees and federal contractors and consultants,
15 to observe and monitor the work.

16 XIII. SAMPLING

17 27. WSDOT shall use quality assurance, quality control, and
18 chain of custody procedures for all samples in accordance with
19 "EPA Requirements for Quality Assurance Project Plans for
20 Environmental Data Operation," (EPA QA/R5; "Preparing Perfect
21 Project Plans," EPA/600/9-88/087). WSDOT shall ensure that the
22 laboratories WSDOT utilizes for the analysis of samples taken
23 pursuant to this Consent Judgment perform all analyses according
24 to accepted EPA methods. Accepted EPA methods consist of those
25 methods which are documented in the "Contract Lab Statement of

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1 Work for Inorganic Analysis" (ILM 4.0) and "Contract Lab Program
2 Statement of Work for Organic Analysis" (OLM 3.1).

3 28. WSDOT shall, upon request, allow split or duplicate
4 samples to be taken by EPA or its authorized representatives.
5 With respect to O&M, WSDOT shall notify EPA not less than twenty-
6 one (21) days in advance of any sample collection activity unless
7 shorter notice is agreed to by EPA. EPA shall have the right to
8 take additional samples that EPA deems necessary and, upon
9 request, EPA shall allow WSDOT to take split or duplicate samples
10 of any samples taken by EPA.

11 XIV. EMERGENCY RESPONSE

12 29. In the event of a threatened release of hazardous
13 substances from the Site that may constitute an emergency
14 situation or present an immediate threat to public health or
15 welfare or the environment, WSDOT shall immediately notify the
16 EPA Project Coordinator, or, if the Project Coordinator is
17 unavailable, the EPA Emergency Response Unit, Region 10.
18 Thereafter, WSDOT shall cooperate with EPA in responding to any
19 such emergency or threat. Nothing in this Consent Judgment shall
20 be deemed to limit any authority of the United States to take all
21 appropriate action or to direct or order such action, or seek an
22 order from the Court, to protect human health and the environment
23 or to prevent, abate, respond to, or minimize an actual or
24 threatened release of hazardous substances on, at, or from the
25 Site.

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XV. STIPULATED PENALTIES

30. WSDOT shall be liable to the United States for stipulated penalties in the amounts set forth in Paragraphs 31 and 32 below for the failure to comply with the requirements specified therein.

31. The following stipulated penalties shall accrue per violation per day for the failure to (a) complete the construction and planting portions of the Habitat Mitigation Work by no later than October 31, 1998; and/or (b) complete the repair or replacement of any breach or compromise to a component of the Remedial Action identified in Paragraph 56(e) below according to the schedule approved by EPA pursuant to said Paragraph 56(e):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$100	1st through 10th day
\$500	11th through 30th day
\$1,000	31st day and beyond

32. The following stipulated penalties shall accrue per violation per day for the failure to (a) submit annual reports and/or data to EPA in accordance with the OMMP; and/or (b) submit plans and schedules to EPA in accordance with Paragraph 56(e):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$50	1st through 60th day
\$100	61st day and beyond

33. All penalties shall begin to accrue on the day after

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1 the complete performance is due or the day a violation occurs,
2 and shall continue to accrue through the final day of the
3 correction of the noncompliance or completion of the activity.
4 However, stipulated penalties shall not accrue: (a) with respect
5 to a deficient resubmission under Section X (EPA APPROVAL OF
6 PLANS, REPORTS AND OTHER ITEMS) of this Consent Judgment, during
7 the period, if any, beginning on the thirty-first (31st) day
8 after EPA's receipt of such submission until the date that EPA
9 notifies WSDOT of any deficiency; (b) with respect to a decision
10 by the Director of the Office of Environmental Cleanup, EPA
11 Region 10, under Subparagraph 64(b) or 65(a) of Section XXII
12 (DISPUTE RESOLUTION) of this Consent Judgment, during the period,
13 if any, beginning on the twenty-first (21st) day after the date
14 that the State's reply to EPA's Statement of Position is received
15 until the date that the Director issues a final decision
16 regarding such dispute; or (c) with respect to judicial review by
17 this Court of any dispute under Section XXII (DISPUTE RESOLUTION)
18 of this Consent Judgment, during the period, if any, beginning on
19 the thirty-first (31st) day after the Court's receipt of the
20 final submission regarding the dispute until the date that the
21 Court issues a final decision regarding such dispute. Nothing
22 herein shall prevent the simultaneous accrual of separate
23 penalties for separate violations of this Consent Judgment.

24 34. Following EPA's determination that WSDOT has failed to
25 comply with a requirement of this Section XV (STIPULATED

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PENALTIES), EPA will give WSDOT written notification of the same and describe the noncompliance. EPA will also send WSDOT a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph 33 regardless of when EPA notifies WSDOT of a violation.

35. All penalties accruing under this Section XV (STIPULATED PENALTIES) shall be due and payable to the United States within thirty (30) days of WSDOT's receipt from EPA of a demand for payment of the penalties, unless within that time WSDOT invokes the dispute resolution procedures under Section XXII (DISPUTE RESOLUTION) of this Consent Judgment. All payments to the United States under this Section XV (STIPULATED PENALTIES) shall be paid by State warrant made payable to "EPA Hazardous Substances Superfund," and shall be mailed to:

Mellon Bank
U.S. EPA, Region 10
Attn: Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

All payments shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #103J, the DOJ Case Number 90-7-1-525b, and the name and address of WSDOT. Copies of check(s) paid pursuant to this Section XV (STIPULATED PENALTIES), and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXV (NOTICES AND SUBMISSIONS) of this Consent Judgment.

36. The payment of penalties shall not alter in any way

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1 WSDOT's obligation to complete the performance of O&M, Habitat
2 Mitigation Work, and Additional Response Actions as required
3 under this Consent Judgment.

4 37. Penalties shall continue to accrue as provided in
5 Paragraph 33 above during any dispute resolution period, but need
6 not be paid until the following:

7 (a) if the dispute is resolved by agreement or by a
8 decision of EPA that is not appealed to this Court, accrued
9 penalties determined to be owing shall be paid to EPA within
10 fifteen (15) days of the agreement or the receipt of EPA's
11 decision or order; or

12 (b) if the dispute is appealed to this Court and the
13 United States prevails in whole or in part, WSDOT shall pay all
14 accrued penalties determined by the Court to be owed to EPA
15 within sixty (60) days of receipt of the Court's decision or
16 order.

17 38. If WSDOT fails to pay stipulated penalties when due,
18 the United States may institute proceedings to collect the
19 penalties, as well as Interest. WSDOT shall pay Interest on the
20 unpaid balance, which shall begin to accrue on the date of demand
21 made pursuant to Paragraph 35 above.

22 39. Nothing in this Consent Judgment shall be construed as
23 prohibiting, altering, or in any way limiting the ability of the
24 United States to seek any other remedies or sanctions available
25 by virtue of the State's violation of this Consent Judgment or of

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1 the statutes and regulations upon which it is based, including,
2 but not limited to, penalties pursuant to Section 122(1) of
3 CERCLA, 42 U.S.C. § 9622(1). Provided, however, that the United
4 States shall not seek civil penalties pursuant to Section 122(1)
5 of CERCLA, 42 U.S.C. § 9622(1), for any violation for which a
6 stipulated penalty is provided herein, except in the case of a
7 willful violation of the Consent Judgment.

8 40. Notwithstanding any other provision of this Section XV
9 (STIPULATED PENALTIES), the United States may, in its
10 unreviewable discretion, waive any portion of stipulated
11 penalties that have accrued pursuant to this Consent Judgment.

12 XVI. COVENANT NOT TO SUE BY THE UNITED STATES

13 41. In consideration of the payments that will be made and
14 work which will be performed by the State under the terms of this
15 Consent Judgment, and except as specifically provided in
16 Paragraphs 42, 44, and 46 below, the United States covenants not
17 to sue or take administrative action against the State pursuant
18 to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606
19 and 9607(a), relating to the Site. With respect to the State's
20 liability for response costs incurred as of the date of entry of
21 this Consent Judgment, this covenant not to sue shall take effect
22 upon receipt by EPA of the payments required by Paragraph 6 of
23 Section V (PAYMENTS TO SITE-SPECIFIC SUPERFUND ACCOUNTS) of this
24 Consent Judgment. This covenant not to sue is conditioned upon
25 the satisfactory performance by the State of its obligations

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1 under this Consent Judgment. This covenant not to sue extends
2 only to the State and does not extend to any other person.

3 42. United States' Pre-Completion Reservations.

4 (a) Notwithstanding any other provision of this
5 Consent Judgment, the United States reserves, and this Consent
6 Judgment is without prejudice to, the right to institute new
7 proceedings or issue an administrative order seeking to compel
8 the State to (i) perform further response actions relating to the
9 WHOU and/or EHOUE that are beyond the scope of the WHOU Remedial
10 Work, Habitat Mitigation Work, O&M, Additional Response Actions,
11 and EHOUE ROD, or (ii) reimburse the United States for further
12 costs of response related to such further response actions, if,
13 prior to completion of the Habitat Mitigation Work and the
14 remedial action under the EHOUE ROD:

15 (aa) conditions at the WHOU and/or EHOUE,

16 previously unknown to EPA, are discovered, or

17 (bb) information, previously unknown to EPA, is

18 received, in whole or in part,

19 and these previously unknown conditions or information together
20 with any other relevant information indicates that the remedial
21 action for the WHOU or EHOUE is not protective of human health or
22 the environment.

23 (b) If the United States determines pursuant to
24 Subparagraph 42(a) above, that further response actions are
25 necessary, EPA shall select the further response action in

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1 accordance with the requirements of CERCLA and the NCP. EPA
2 shall notify the State in writing of the further response actions
3 determined to be necessary by EPA and the schedule for performing
4 such further response actions. The State shall notify EPA in
5 writing whether the State consents to perform the further
6 response actions, including any request for modifications to the
7 nature, scope or schedule for performing such further response
8 actions. If the State consents to perform the further response
9 actions, such actions shall be undertaken by the State pursuant
10 to a modification to this Consent Judgment.

11 (c) Notwithstanding any other provision of this
12 Consent Judgment, in the event that the State performs further
13 response actions pursuant to this Paragraph 42, the State shall
14 have the right to institute proceedings in this action or in a
15 new action to seek recovery from PACCAR, the United States, and
16 from any other potentially liable party of all costs incurred by
17 the State to perform the further response actions.

18 43. For purposes of Paragraph 42 above, the information and
19 conditions known to EPA shall include: (a) with respect to the
20 EHO, only that information and those conditions known to EPA as
21 of the date of issuance of the EHO ROD, as set forth in the EHO
22 ROD and the administrative record supporting the EHO ROD, and
23 including the Final OSC Report dated September 23, 1994, the
24 Environmental Monitoring Report dated July 31, 1996, and the
25 Technical Memo for Wyckoff Groundwater Extraction dated December

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1 1995; and (b) with respect to the WHOU, only that information and
2 those conditions known to EPA as of the date of approval of the
3 WHOU Remedial Design, as set forth in the administrative record.

4 44. United States' Post-Completion Reservations.

5 (a) Notwithstanding any other provision of this
6 Consent Judgment, the United States reserves, and this Consent
7 Judgment is without prejudice to, the right to institute
8 proceedings in a new action or to issue an administrative order
9 seeking to compel the State to (i) perform further response
10 actions relating to the WHOU and/or EHOU that are beyond the
11 scope of the WHOU Remedial Work, Habitat Mitigation Work, O&M,
12 Additional Response Actions, and EHOU ROD or (ii) reimburse the
13 United States for further costs of response related to such
14 further response actions if, after completion of the Habitat
15 Mitigation Work and the remedial action under the EHOU ROD:

16 (aa) conditions at the WHOU and/or EHOU, previously
17 unknown to EPA, are discovered, or

18 (bb) information, previously unknown to EPA, is
19 received, in whole or in part,

20 and these previously unknown conditions or information together
21 with any other relevant information indicates that the Remedial
22 Action for the WHOU and/or the remedial action under the EHOU ROD
23 is not protective of human health or the environment.

24 (b) If the United States determines pursuant to
25 Subparagraph 44(a) above, that further response actions are

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1 necessary, EPA shall select the further response actions in
2 accordance with the requirements of CERCLA and the NCP. EPA
3 shall notify the State in writing of the further response actions
4 determined to be necessary by EPA and the schedule for performing
5 such further response actions. The State shall notify EPA in
6 writing whether the State consents to perform further response
7 actions, including any request for modifications to the nature,
8 scope or schedule for performing such further response actions.
9 If the State consents to perform further response actions, such
10 actions shall be undertaken by the State pursuant to a
11 modification to this Consent Judgment.

12 (c) Notwithstanding any other provision of this
13 Consent Judgment, in the event that the State performs further
14 response actions pursuant to this Paragraph 44, the State shall
15 have the right to institute proceedings in this action or in a
16 new action to seek recovery from PACCAR, the United States, and
17 from any other potentially liable party of all costs incurred by
18 the State to perform further response actions.

19 45. For purposes of Paragraph 44 above, the information and
20 the conditions known to EPA shall include: (a) with respect to
21 the EHOJ, only that information and those conditions known to EPA
22 as of the date of completion of the remedial action in accordance
23 with the EHOJ ROD; and (b) with respect to the WHOJ, only that
24 information and those conditions known to EPA as of the date of
25 completion of the Habitat Mitigation Work.

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1 46. General Reservations of Rights. The covenant not to
2 sue set forth above does not pertain to any matters other than
3 those expressly specified therein. The United States reserves,
4 and this Consent Judgment is without prejudice to, all rights
5 against the State with respect to all other matters, including,
6 but not limited to, the following:

7 (a) liability for failure of the State to meet a
8 requirement of this Consent Judgment;

9 (b) liability arising from the past, present, or future
10 disposal, release, or threat of release of hazardous substances
11 outside of the Site;

12 (c) liability for damages for injury to, destruction
13 of, or loss of natural resources at the Site, and/or for the
14 costs of any natural resource damage assessments;

15 (d) criminal liability;

16 (e) liability for future disposal by the State of
17 hazardous substances at the Site; and

18 (f) liability for violations of Federal or State law.

19 XVII. COVENANT NOT TO SUE BY THE STATE

20 47. Subject to the reservations in Paragraph 48 below, the
21 State covenants not to sue and agrees not to assert any claims or
22 causes of action against the United States, or its contractors or
23 employees, with respect to the Site or this Consent Judgment,
24 including, but not limited to:

25 (a) any direct or indirect claim for reimbursement

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1 from the Hazardous Substance Superfund based on Sections
2 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C.
3 §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision
4 of law;

5 (b) any claim arising out of response actions at the
6 Site, including claims based on EPA's selection of response
7 actions, oversight of response actions or implementation of
8 response actions; and

9 (c) with the exception of claims for natural resource
10 damages under Section 107 of CERCLA, 42 U.S.C. § 9607, any claim
11 against the United States, including the Settling Federal
12 Agencies and any other department, agency or instrumentality of
13 the United States under Section 107 or 113 of CERCLA, 42 U.S.C.
14 § 9607 or 9613, relating to the Site.

15 48. The State reserves, and this Consent Judgment is
16 without prejudice to, claims against the United States for
17 natural resource damages pursuant to 42 U.S.C. § 9607, claims for
18 the recovery of costs incurred for further response actions
19 implemented by the State pursuant to Subparagraphs 42(c) and
20 44(c) above, and claims against the United States, subject to the
21 provisions of Chapter 171 of Title 28 of the United States Code,
22 for money damages for injury or loss of property or personal
23 injury or death caused by the negligent or wrongful act or
24 omission of any employee of the United States while acting within
25 the scope of his or her office or employment under circumstances

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1 where the United States, if a private person, would be liable to
2 the claimant in accordance with the law of the place where the
3 act or omission occurred. However, any such claim shall not
4 include a claim for any damages caused, in whole or in part, by
5 the act or omission of any person, including any contractor, who
6 is not a federal employee as that term is defined in 28 U.S.C.
7 § 2671; nor shall any such claim include a claim based on EPA's
8 selection of response actions or oversight or approval of
9 response actions undertaken at the Site. The foregoing applies
10 only to claims which are brought pursuant to any statute other
11 than CERCLA and for which the waiver of sovereign immunity is
12 found in a statute other than CERCLA.

13 49. Nothing in this Consent Judgment shall be deemed to
14 constitute approval or preauthorization of a claim within the
15 meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
16 300.700(d).

17 XVIII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

18 50. Nothing in this Consent Judgment shall be construed to
19 create any rights in, or grant any cause of action to, any person
20 not a party to this Consent Judgment. The United States and the
21 State expressly reserve any and all rights (including, but not
22 limited to, any right to contribution), defenses, claims,
23 demands, and causes of action which each may have with respect to
24 any matter, transaction, or occurrence relating in any way to the
25 Site against any person not a party to this Consent Judgment.

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1 51. The United States and the State agree, and by entering
2 this Consent Judgment this Court finds, that the State is
3 entitled, as of the effective date of this Consent Judgment, to
4 protection from contribution actions or claims as provided by
5 Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for the
6 matters addressed in this Consent Judgment, including all matters
7 related to the Wyckoff/Eagle Harbor Superfund Site except for
8 those matters specifically excluded by Subparagraphs 46(a) to (f)
9 above. The United States and the State further agree, and by
10 entering this Consent Judgment this Court finds, that the United
11 States as defendant in Cause No. C94-5326, including all
12 potentially responsible federal agencies, is entitled, as of the
13 effective date of this Consent Judgment, to protection from
14 contribution actions or claims as provided in Section 113(f)(2)
15 of CERCLA, 42 U.S.C. § 9613(f)(2) for matters addressed in this
16 Consent Judgment, including all matters related to the
17 Wyckoff/Eagle Harbor Superfund Site, except those matters
18 specifically excluded by Subparagraphs 46(a) to (f) above.

19 52. The State agrees that, with respect to any suit or
20 claim for contribution brought by the State for matters addressed
21 in this Consent Judgment, the State will notify EPA and DOJ, in
22 writing, no later than sixty (60) days prior to the initiation of
23 such suit or claim. The State also agrees that, with respect to
24 any suit or claim for contribution brought against the State for
25 matters addressed in this Consent Judgment, the State will notify

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1 EPA and DOJ, in writing, within ten (10) days of service of the
2 complaint or claim upon the State. In addition, the State shall
3 notify EPA and DOJ within ten (10) days of service or receipt of
4 any Motion for Summary Judgment, and within ten (10) days of
5 receipt of any order from a court setting a case for trial, for
6 matters addressed in this Consent Judgment.

7 53. In any subsequent administrative or judicial proceeding
8 initiated by the United States for injunctive relief, recovery of
9 response costs, or other relief relating to the Site, neither the
10 State nor the United States shall assert or maintain any defense
11 or claim based upon the principles of waiver, res judicata,
12 collateral estoppel, issue preclusion, claim-splitting, or other
13 defenses based upon any contention that the claims raised in the
14 subsequent proceeding were, or should have been, brought in the
15 instant case; provided, however, that nothing in this Paragraph
16 52 affects the enforceability of the covenants not to sue by the
17 United States and the State set forth in Sections XVI (COVENANT
18 NOT TO SUE BY THE UNITED STATES) and XVII (COVENANT NOT TO SUE BY
19 THE STATE) of this Consent Judgment.

20 XIX. ACCESS TO THE SITE

21 54. Commencing upon the date of entry of this Consent
22 Judgment, and continuing thereafter until EPA specifies
23 otherwise, the State shall provide PACCAR, the United States,
24 including EPA, and all of their representatives, access at all
25 reasonable times to all property owned or controlled by the State

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1 to which access is determined by EPA to be necessary for the
2 implementation of any activities authorized by this Consent
3 Judgment and/or the Consent Decree entered into between PACCAR
4 and the United States. Said access shall also be for the purpose
5 of conducting any response actions related to the Site,
6 including, but not limited to the following:

7 (a) monitoring or implementing investigations or
8 removal, remedial, or other response actions at the Site;

9 (b) verifying any data or information submitted to the
10 United States;

11 (c) conducting investigations relating to contamination
12 at or near the Site;

13 (d) obtaining samples;

14 (e) assessing the need for, planning, or implementing
15 response actions at or near the Site; and

16 (f) inspecting and copying records, operating logs,
17 contracts, or other documents maintained or generated by the
18 State or agents or assigns of the State, consistent with Section
19 XXIII (ACCESS TO INFORMATION) of this Consent Judgment.

20 55. Notwithstanding any provision of this Consent Judgment,
21 the United States retains all of its access authorities and
22 rights, including enforcement authorities related thereto, under
23 CERCLA and any other applicable statutes or regulations.

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1 XX. INSTITUTIONAL CONTROLS

2 56. Commencing upon the date of entry of this Consent
3 Judgment, and continuing thereafter until EPA specifies
4 otherwise, the State shall abide by and perform in accordance
5 with the restrictions and obligations for land use set forth in
6 Subparagraphs (a) thorough (f) below. These restrictions and
7 obligations pertain to all real property located within the EHO
8 and WHO which is owned or controlled by the State.

9 (a) Containment Areas. With the exception of a
10 disturbance to sediments which may be caused by navigation of
11 those vessels not within the control of the State, there shall be
12 no disturbance of the sediment caps, tidal barrier, diversion
13 trench, asphalt cap, solidified surface soils, confined disposal
14 facility, or other containment structures that are part of the
15 response actions for the WHO.

16 (b) Public Access Restrictions. There shall be no
17 disturbance of the fencing and other restrictions to public
18 access.

19 (c) Wells. There are two (2) wells presently located
20 in the upland area of the WHO. No other wells shall be
21 installed in the upland area except as may be approved or
22 required by EPA. Water extracted from these wells shall not be
23 used for human ingestion.

24 (d) Industrial Use. Only industrial use shall be
25 allowed in the upland area of property in the WHO where

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contaminated soils remain on-Site.

(e) Breach or Compromise.

(i) The State shall provide notice to EPA immediately after the discovery of any breach or compromise to the tidal barrier, diversion trench, solidified surface soils, confined disposal facility, sediment caps, or any well. WSDOT shall repair, and/or replace, the breach or compromise, as the case may be, in accordance with the plan and schedule approved by EPA. This obligation of WSDOT to repair or replace does not apply to the sediment cap or other containment structures in the EHOU.

(ii) Unless otherwise provided for either below or in the OMMP, within thirty (30) days of discovery of a breach or compromise, WSDOT shall submit a plan and schedule to EPA, for review and approval, for repair or replacement of the breach or compromise. If in the judgment of the State more than thirty (30) days is needed for the preparation and submittal of such a plan and schedule, the State shall, within ten (10) days of discovery of the breach or compromise, provide a written request to EPA seeking additional time to submit the plan and schedule. In the written request, the State must specify the exact number of additional days deemed necessary to prepare and submit the plan and schedule and the basis for this claim. Within ten (10) days of receipt of such a request, EPA will notify the State as to whether EPA agrees that there is a need for additional time.

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1 If EPA so agrees, the due date for submittal of the plan and
2 schedule shall be extended for the exact number of days specified
3 by EPA in the notice to the State. If EPA does not agree, EPA
4 will so notify the State, and the State shall have thirty (30)
5 days from such notification to submit the plan and schedule to
6 EPA.

7 57. The State shall cooperate in efforts to limit the
8 anchoring of vessels in areas of sediment capping throughout the
9 WHOU and EHOU.

10 XXI. CONVEYANCES

11 58. Within fifteen (15) days after entry of this Consent
12 Judgment, the State shall record a notice of this Consent
13 Judgment with the Recorder's Office, Kitsap County, Washington,
14 and with the Commissioner of Public Lands, in accordance with
15 State law, for all property at the Site which is owned or
16 controlled by the State.

17 59. If WSDOT conveys an ownership interest in all or any
18 portion of the real property located within the WHOU of the Site,
19 WSDOT agrees to include the requirements for access set forth in
20 Paragraph 54 above as an easement which runs with the land.
21 WSDOT also agrees to include, as restrictive covenants, the
22 Institutional Controls set forth in Paragraph 56 above and an
23 easement for enforcement which runs with the land. Following any
24 conveyance by WSDOT, for all property which remains within the
25 ownership or control of the State, the requirements in this

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1 Section XXI (CONVEYANCES) and Sections XIX (ACCESS TO THE SITE)
2 and XX (INSTITUTIONAL CONTROLS) of this Consent Judgment shall
3 continue to be met by the State.

4 60. In no event shall the conveyance of an interest in
5 property that includes, or is a portion of the Site, release or
6 otherwise affect the liability of the State to comply with this
7 Consent Judgment.

8 XXII. DISPUTE RESOLUTION

9 61. Unless otherwise expressly provided for in this Consent
10 Judgment, the dispute resolution procedures of this Section XXII
11 (DISPUTE RESOLUTION) shall be the exclusive mechanism to resolve
12 disputes arising under or with respect to this Consent Judgment.
13 However, the procedures set forth in this Section XXII (DISPUTE
14 RESOLUTION) shall not apply to actions by the United States to
15 enforce obligations of the State that have not been disputed in
16 accordance with this Section XXII (DISPUTE RESOLUTION).

17 62. Any dispute which arises under or with respect to this
18 Consent Judgment shall in the first instance be the subject of
19 informal negotiations between the United States and the State.
20 The period for informal negotiations shall not exceed twenty (20)
21 days from the time the dispute arises, unless it is modified by
22 written agreement of the United States and the State. The
23 dispute shall be considered to have arisen when one party sends
24 the other party a written Notice of Dispute.

25 63. (a) In the event that the United States and the State
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1 cannot resolve a dispute by informal negotiations under the
2 preceding Paragraph 62, then the position advanced by EPA shall
3 be considered binding unless, within 10 days after the conclusion
4 of the informal negotiation period, the State invokes the formal
5 dispute resolution procedures of this Section XXII (DISPUTE
6 RESOLUTION) by serving on the United States a written Statement
7 of Position on the matter in dispute, including, but not limited
8 to, any factual data, analysis, or opinion supporting that
9 position and any supporting documentation relied upon by the
10 State. The Statement of Position shall specify the States'
11 position as to whether formal dispute resolution should proceed
12 under Paragraph 64 or 65 below.

13 (b) Within 20 days after receipt of the States'
14 Statement of Position, EPA will serve on the State EPA's
15 Statement of Position, including, but not limited to, any factual
16 data, analysis, or opinion supporting that position and all
17 supporting documentation relied upon by EPA. EPA's Statement of
18 Position shall include a statement as to whether formal dispute
19 resolution should proceed under Paragraph 64 or 65 below. Within
20 5 days after receipt of EPA's Statement of Position, the State
21 may submit a Reply.

22 (c) If there is disagreement between EPA and the State
23 as to whether dispute resolution should proceed under Paragraph
24 64 or 65 below, the United States and the State shall follow the
25 procedures set forth in the paragraph determined by EPA to be

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1 applicable. However, if the State ultimately appeals to the
2 Court to resolve the dispute, the Court shall determine which
3 paragraph is applicable in accordance with the standards of
4 applicability set forth in Paragraphs 64 and 65 below.

5 64. Formal dispute resolution for disputes pertaining to
6 the selection or adequacy of any response action and all other
7 disputes that are accorded review on the administrative record
8 under applicable principles of administrative law shall be
9 conducted pursuant to the procedures set forth in this Paragraph
10 64. For purposes of this Paragraph 64, the adequacy of any
11 response action includes, without limitation, the adequacy or
12 appropriateness of plans, procedures to implement plans, or any
13 other items requiring approval by EPA under this Consent
14 Judgment, and the adequacy of the performance of response actions
15 taken pursuant to this Consent Judgment. Nothing in this Consent
16 Judgment shall be construed to allow any dispute by the State
17 regarding the validity of the provisions in either the WHOU ROD
18 or EHOU ROD.

19 (a) An administrative record of the dispute shall be
20 maintained by EPA and shall contain all statements of position,
21 including supporting documentation, submitted pursuant to this
22 Section XXII (DISPUTE RESOLUTION). Where appropriate, EPA may
23 allow submission of supplemental statements of position.

24 (b) The Director of the Office of Environmental
25 Cleanup, EPA Region 10, will issue a final administrative

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1 decision resolving the dispute based on the administrative record
2 described in Subparagraph 64(a) above. This decision shall be
3 binding upon the State, subject only to the right to seek
4 judicial review pursuant to Subparagraphs 64(c) and (d) below.

5 (c) Any administrative decision made by EPA pursuant to
6 Subparagraph 64(b) above shall be reviewable by this Court,
7 provided that a motion for judicial review of the decision is
8 filed by the State with the Court and served on the United States
9 within ten (10) days of receipt of EPA's decision. The motion
10 shall include a description of the matter in dispute, the efforts
11 made by the United States and the State to resolve the dispute,
12 the relief requested, and the schedule, if any, within which the
13 dispute must be resolved to ensure orderly implementation of this
14 Consent Judgment. The United States may file a response to the
15 States' motion.

16 (d) In proceedings on any dispute governed by this
17 Paragraph 64, the State shall have the burden of demonstrating
18 that the decision of the Office of Environmental Cleanup Director
19 is arbitrary and capricious or otherwise not in accordance with
20 law. Judicial review of EPA's decision shall be on the
21 administrative record compiled pursuant to Subparagraph 64(a)
22 above.

23 65. Formal dispute resolution for disputes that neither
24 pertain to the selection or adequacy of any response action nor
25 are otherwise accorded review on the administrative record under

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1 applicable principles of administrative law, shall be governed by
2 this Paragraph 65.

3 (a) Following receipt of the State's Statement of
4 Position submitted pursuant to Paragraph 63 above, the Director
5 of the Office of Environmental Cleanup, EPA Region 10, will issue
6 a final decision resolving the dispute. The Director's decision
7 shall be binding on the State unless, within ten (10) days of
8 receipt of the decision, the States files with the Court and
9 serves on the United States a motion for judicial review of the
10 decision setting forth the matter in dispute, the efforts made by
11 the United States and the State to resolve the dispute, the
12 relief requested, and the schedule, if any, within which the
13 dispute must be resolved to ensure orderly implementation of this
14 Consent Judgment. The United States may file a response to the
15 States' motion.

16 (b) Judicial review of any dispute governed by this
17 Paragraph 65 shall be governed by applicable principles of law.

18 66. The invocation of formal dispute resolution procedures
19 under this Section XXII (DISPUTE RESOLUTION) shall not extend,
20 postpone, or affect in any way any obligation of the State under
21 this Consent Judgment not directly in dispute, unless EPA or the
22 Court agrees otherwise.

23 XXIII. ACCESS TO INFORMATION

24 67. The State shall provide to EPA, upon request, copies of
25 all documents and information within the possession or control of

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1 the State or of contractors or agents of the State relating to
2 activities at the Site, including, but not limited to, sampling,
3 analysis, chain-of-custody records, manifests, trucking logs,
4 receipts, reports, sample traffic routing, correspondence, or
5 other documents or information related to the Site.

6 68. The State may assert business confidentiality claims
7 covering part or all of the documents or information submitted to
8 the United States under this Consent Judgment to the extent
9 permitted by and in accordance with Section 104(e)(7) of CERCLA,
10 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Documents or
11 information determined to be confidential by EPA will be accorded
12 the protection specified in 40 C.F.R. Part 2, Subpart B. If no
13 claim of confidentiality accompanies documents or information
14 when they are submitted to EPA, or if EPA has notified the State
15 that the documents or information are not confidential under the
16 standards of Section 104(e)(7) of CERCLA, the public may be given
17 access to such documents or information without further notice to
18 the State.

19 69. The State may assert that certain documents, records,
20 or other information are privileged under the attorney-client
21 privilege or any other privilege recognized by federal law. If
22 the State asserts such a privilege in lieu of providing
23 documents, the State shall provide the United States with the
24 following: (a) the title of the document, record, or
25 information; (b) the date of the document, record, or

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1 information; (c) the name and title of the author of the
2 document, record, or information; (d) the name and title of each
3 addressee and recipient; (e) a description of the subject of the
4 document, record, or information; and (f) the privilege asserted.
5 However, no documents, reports, or other information created or
6 generated pursuant to the requirements of this or any other
7 consent decree with the United States shall be withheld on the
8 grounds that they are privileged. If a claim of privilege
9 applies only to a portion of a document, the document shall be
10 provided to the United States in redacted form to mask the
11 privileged information only. The State shall retain all records
12 and documents that they claim to be privileged until the United
13 States has had a reasonable opportunity to dispute the privilege
14 claim and any such dispute has been resolved in the State's
15 favor.

16 70. No claim of confidentiality shall be made with respect
17 to any data, including, but not limited to, all sampling,
18 analytical, monitoring, hydrogeologic, scientific, chemical, or
19 engineering data, or any other documents or information
20 evidencing conditions at or around the Site.

21 XXIV. RETENTION OF RECORDS

22 71. Until ten (10) years after the entry of this Consent
23 Judgment, the State shall preserve and retain all records and
24 documents now in the possession or control of the State, or which
25 come into the possession or control of the State, that relate in

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1 any manner to response actions taken at the Site or the liability
2 of any person for response actions conducted and to be conducted
3 at the Site, regardless of any government retention policy to the
4 contrary.

5 72. If, at the conclusion of the document retention period
6 in the preceding Paragraph 71, the State intends to destroy the
7 records or documents referenced in the preceding Paragraph 71,
8 the State shall notify EPA and DOJ at least ninety (90) days
9 prior to the destruction of any such records or documents, and,
10 upon request by EPA or DOJ, the State shall deliver any such
11 records or documents to EPA. The State may assert that certain
12 documents, records, or other information are privileged under the
13 attorney-client privilege or any other privilege recognized by
14 federal law. If the State asserts such a privilege, the State
15 shall provide the United States with the following: (a) the
16 title of the document, record, or information; (b) the date of
17 the document, record, or information; (c) the name and title of
18 the author of the document, record, or information; (d) the name
19 and title of each addressee and recipient; (e) a description of
20 the subject of the document, record, or information; and (f) the
21 privilege asserted. However, no documents, reports, or other
22 information created or generated by the State or its contractors
23 or non-lawyer agents pursuant to the requirements of this Consent
24 Judgment or any consent decree with the United States shall be
25 withheld on the grounds that they are privileged. If a claim of

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1 privilege applies only to a portion of a document, the document
2 shall be provided to the United States in redacted form to mask
3 the privileged information only. The State shall retain all
4 records and documents that it claims to be privileged until the
5 United States has had a reasonable opportunity to dispute the
6 privilege claim and any such dispute has been resolved in the
7 State's favor.

8 73. The State hereby certifies that, to the best of its
9 knowledge and belief, it has:

10 (a) conducted a thorough, comprehensive, good faith
11 search for documents, and has fully and accurately disclosed, to
12 EPA, all non-privileged information currently in the possession
13 of the State, or in the possession of officials, employees,
14 contractors, or agents of the State, which relates in any way to
15 the ownership, operation, or control of the Site, or to the
16 ownership, possession, generation, treatment, transportation,
17 storage, or disposal of a hazardous substance, pollutant, or
18 contaminant at or in connection with the Site;

19 (b) not altered, mutilated, discarded, destroyed, or
20 otherwise disposed of any records, documents, or other
21 information relating to the potential liability of the State
22 regarding the Site, after notification of potential liability or
23 the filing of a suit against the State regarding the Site; and

24 (c) fully complied with any and all EPA requests for
25 information regarding the Site issued pursuant to Section 104(e)

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of CERCLA, 42 U.S.C. § 9604(e).

XXV. NOTICES AND SUBMISSIONS

74. Whenever, under the terms of this Consent Judgment, notice is required to be given or a document is required to be sent by one party to the other party, said notice or document shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give written notice of a change to the other party. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Judgment with respect to the United States, EPA, DOJ, and the State, respectively.

For notices to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-7-1-525b)
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611

- and -

Joseph A. Penwell
Office of Management and Programs, Finance Unit
U.S. EPA, Region 10, OMP-146
1200 Sixth Avenue
Seattle, Washington 98101

- and -

Ellen Hale, Project Coordinator W/EH-WHOU
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Notices to EPA need only be sent to the EPA Project Coordinator.

As to the State:

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1 Richard A. Singer, Project Coordinator W/EH-WHOU
2 Environmental Affairs Office
3 Washington Department of Transportation
310 Maple Park Ave. S.E., P.O. Box 47331
4 Olympia, Washington 98504-7331

5 - and -

6 Maria Peeler, Division Manager
7 Aquatic Resources Division
8 Washington Department of Natural Resources
1111 Washington St. S.E.
P.O. Box 47027
Olympia, Washington 98504-7027

9 Notices to WSDOT need only be sent to the WSDOT Project
10 Coordinator.

11 XXVI. RETENTION OF JURISDICTION

12 75. This Court retains jurisdiction over both the subject
13 matter of this Consent Judgment and the State for the duration of
14 the performance of the terms and provisions of this Consent
15 Judgment for the purpose of enabling the United States or the
16 State to apply to the Court at any time for such further order,
17 direction, and relief as may be necessary or appropriate for the
18 construction or modification of this Consent Judgment, or to
19 effectuate or enforce compliance with its terms, or to resolve
20 any disputes between the United States and the State.

21 XXVII. INTEGRATION/APPENDICES

22 76. This Consent Judgment and the appendices hereto
23 constitute the final, complete, and exclusive agreement and
24 understanding between the United States and the State with
25 respect to the settlement embodied in this Consent Judgment. The

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1 United States and the State acknowledge that there are no other
2 representations, agreements, or understandings relating to the
3 settlement other than those expressly contained in this Consent
4 Judgment. The following appendices are attached to and
5 incorporated into this Consent Judgment:

6 "Appendix A" is a copy of the revised OMMP approved by
7 EPA on November 19, 1997.

8 XXVIII. MODIFICATIONS

9 77. There may be modification of the plans and schedules
10 developed for completion of the Habitat Mitigation Work, O&M, and
11 Additional Response Actions. Each modification must be in
12 writing and must be consistent with the Goals and Objectives of
13 the WHOUE ROD. Within thirty (30) days of request by EPA, or upon
14 initiative of WSDOT, a proposed modification shall be submitted
15 by WSDOT for the review and approval of EPA. This proposal shall
16 be subject to the requirements of Section X (EPA APPROVAL OF
17 PLANS, REPORTS AND OTHER ITEMS) of this Consent Judgment. There
18 shall be no material modification to the Habitat Mitigation Work,
19 O&M, or Additional Response Actions without prior approval by the
20 Court. This Paragraph 77 shall only apply to work performed
21 after entry of this Consent Judgment.

22 78. If WSDOT objects to an EPA request for modification
23 made pursuant to Paragraph 77 above, WSDOT may seek dispute
24 resolution pursuant to Section XXII (DISPUTE RESOLUTION) of this
25 Consent Judgment.

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1 79. Nothing in this Consent Judgment shall be deemed to
2 alter the Court's power to enforce, supervise, or approve
3 modifications to this Consent Judgment.

4 XXIX. OPPORTUNITY FOR PUBLIC COMMENT

5 80. This Consent Judgment shall be submitted for public
6 notice and comment prior to entry with the Court. The United
7 States reserves the right to withdraw or withhold its consent if
8 the comments regarding the Consent Judgment disclose facts or
9 considerations which indicate that this Consent Judgment is
10 inappropriate, improper, or inadequate. The State consents to
11 the entry of this Consent Judgment without further notice.

12 81. If for any reason this Court should decline to approve
13 this Consent Judgment in the form presented, this agreement is
14 voidable at the sole discretion of either party and the terms of
15 the agreement may not be used as evidence in any litigation
16 between the United States and the State.

17 XXX. EFFECTIVE DATE

18 82. The effective date of this Consent Judgment shall be
19 the date upon which it is entered by the Court.

20 XXXI. SIGNATORIES/SERVICE

21 83. The undersigned representatives of the State and the
22 Assistant Attorney General for the Environment and Natural
23 Resources Division, Environmental Enforcement Section, certifies
24 that he or she is authorized to enter into the terms and
25 conditions of this Consent Judgment and to execute and bind

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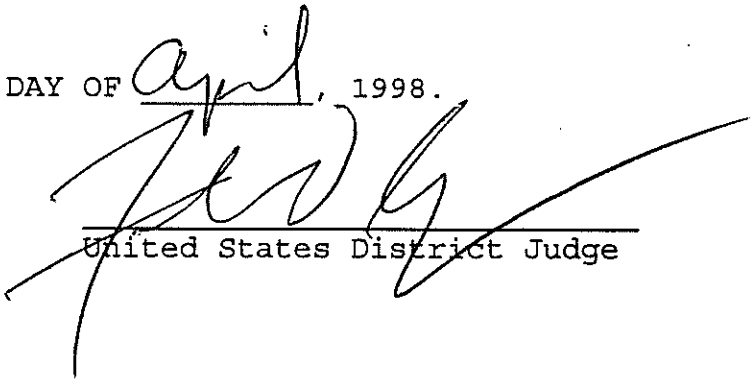
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1 legally that party to this document.

2 84. The State hereby agrees not to oppose entry of this
3 Consent Judgment by this Court or to challenge any provision of
4 this Consent Judgment, unless the United States has notified the
5 State, in writing, that the United States no longer supports
6 entry of the Consent Judgment.

7 85. The State shall identify, on the attached signature
8 page, the name and address of an agent who is authorized to
9 accept service by mail on behalf of the State with respect to all
10 matters arising under or relating to this Consent Judgment.

11
12 SO ORDERED THIS 12 DAY OF April, 1998.

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14 
15 United States District Judge
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1 The UNITED STATES OF AMERICA enters into this Consent Judgment in
2 United States v. State of Washington and PACCAR, civil action No.
3 C94-5326, relating to the Wyckoff/Eagle Harbor Superfund Site.

4 FOR THE UNITED STATES OF AMERICA

5
6 Date: Dec 16, 1998

Lois J. Schiffer
7 LOIS J. SCHIFFER
8 Assistant Attorney General
9 Environment and Natural Resource
10 Division
11 U.S. Department of Justice
12 Washington, D.C. 20530

James L. Nicoll
12 SEAN CARMAN
13 Environmental Enforcement Section
14 Environment and Natural Resources
15 Division
16 U.S. Department of Justice
17 c/o NOAA/DOJ - DARC
18 7600 Sand Point Way, N.E.
19 Seattle, Washington 98115-7600
20 (206) 526-6616

Lewis M. Barr
21 LEWIS M. BARR
22 Environmental Defense Section
23 Environmental and Natural Resources
24 Division
25 United States Department of Justice

Richard D. Mednick
26 RICHARD D. MEDNICK - WSBA # 17697
27 Associate Regional Counsel
28 U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101

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1 The STATE OF WASHINGTON enters into this Consent Judgment in
2 United States v. State of Washington and PACCAR, civil action No.
3 C94-5326, relating to the Wyckoff/Eagle Harbor Superfund Site.

4 FOR THE STATE OF WASHINGTON

5 Date:

June 25, 1998

CHRISTINE O. GREGOIRE
Attorney General

7
8 
CHARLES F. SECREST, WSBA # 3265
Assistant Attorney General
9 DEBORAH L. CADE, WSBA # 18329
Assistant Attorney General
10 ANNE L. SPANGLER, WSBA #22189
Assistant Attorney General
11 Attorneys for State of Washington,
12 Department of Transportation and
13 Department of Natural Resources
14

15 Agent Authorized to Accept Service on Behalf of the State:

16
17 Name: CHRISTINE O. GREGOIRE
18 Attorney General
19 State of Washington
20 P.O. Box 40100
21 Olympia, Washington 98504
22
23
24
25

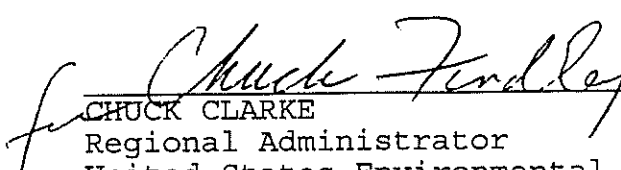
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1 THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY enters into this
2 Consent Judgment in United States v. State of Washington and PACCAR,
3 civil action No. C94-5326, relating to the Wyckoff/Eagle Harbor
4 Superfund Site.

5 FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

6
7 
8 CHUCK CLARKE
9 Regional Administrator
10 United States Environmental
11 Protection Agency
12 Region 10
13 1200 Sixth Avenue
14 Seattle, Washington 98101
15
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